

MAH7MIA1 - CORRECT

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 499 (PAE)

5 DAVON MIAL,

6
7 Defendant.

8 Trial

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9
10 New York, N.Y.
October 17, 2022
11 9:00 a.m.

12 Before:

13 HON. PAUL A. ENGELMAYER,

14 District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 United States Attorney for the
Southern District of New York

18 BY: KEDAR S. BHATIA

ASHLEY C. NICOLAS

19 MATTHEW J.C. HELLMAN

Assistant United States Attorneys

20 LAW OFFICES OF DANIEL A. MCGUINNESS, PC

21 Attorney for Defendant

22 BY: DANIEL A. MCGUINNESS

23 Also Present:

OWEN FOLEY, U.S.A.O. Paralegal

24 NICHOLAS KIM, Defense Paralegal

SIMON OTERO, U.S.A.O. Paralegal Intern

25 SPECIAL AGENT ELLIOT RENZ, Homeland Security

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(Case called)

MR. BHATIA: Good morning. Kedar Bhatia for the United States, joined by Ashley Nicolas, AUSA, Matt Hellman AUSA, paralegal intern, Simon Otero, and Special Agent --

THE COURT: Sorry. Let me take this slow. I know you two. Next at the table is?

MR. HELLMAN: Matthew Hellman. Good morning, your Honor.

THE COURT: Good morning. Okay.

MR. FOLEY: Owen Foley. Good morning, your Honor.

THE COURT: Good morning. Okay. Go ahead.

MR. BHATIA: And Simon Otero is our paralegal intern.

THE COURT: Give me the full spelling.

MR. BHATIA: Simon, S-I-M-O-N, Otero, O-T-E-R-O.

And one thing to note about Mr. Otero is I don't think he's on our list of people who you'll see for the government. I think he will be sitting at counsel table and doing some of the witness presentation stuff.

THE COURT: Okay. So Mr. Otero is an AUSA?

MR. BHATIA: No. I'm sorry. He'll be sitting at counsel table and doing the trial director.

THE COURT: I see. In any event, all five of you at some point or another will be at the table; therefore, I need to identify everybody?

MR. BHATIA: Exactly.

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1 THE COURT: Very good. Welcome to all of you. You
2 may be seated.

3 MR. MCGUINNESS: Good morning, your Honor.

4 THE COURT: Good morning.

5 MR. MCGUINNESS: Daniel McGuinness for Mr. Mial. And
6 Mr. Mial is to my right. And to his right is my paralegal,
7 Nicholas Kim, who will be joining us for the trial.

8 THE COURT: Very good. Good morning, Mr. McGuinness.
9 Good morning, Mr. Kim. And, of course, good morning to you,
10 Mr. Mial.

11 Government, there's a sixth person over here.

12 MR. BHATIA: Yes. Special Agent Elliot Renz will also
13 be sitting at the government table during the trial.

14 THE COURT: Last name is spelled?

15 MR. BHATIA: R-E-N-Z.

16 THE COURT: All right. One moment.

17 Mr. Bhatia, for the purpose of jury selection, it will
18 be necessary for you -- you don't have to do it now, but when
19 people come to the sidebar, they're usually following this
20 path. I'm fine and Mr. Smallman is fine, during jury
21 selection, having all six of you up here. And it is in some
22 respects easier, because I have to identify the trial
23 participants for the jury. It gets to too congested to have
24 everybody up here during the trial, so you'll need to have find
25 out someday of rotating.

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1 MR. BHATIA: Understood.

2 THE COURT: All right. Very good.

3 Okay. I've got a handful of items to take up with
4 you. As to timing, though, Mr. Smallman tells me that because
5 today is a Monday and the jury first needs to get its marching
6 orders—its training session, if you will—we're likely not to
7 have a venire here until after 10 o'clock and potentially after
8 10:30. We'll see. It depends where we are in the batting
9 order today, but just in terms of people's expectations.

10 Now, I have a handful of items to take up. The first
11 one, which I think ought to be brief, is as follows:

12 First, at a recent conference, I allocuted counsel and
13 the defendant about plea offers. Just to confirm, has any
14 intervening plea offer from the government been made to the
15 defense?

16 MR. BHATIA: We have not made any plea offer.

17 MR. MCGUINNESS: Your Honor, I'd like to make a record
18 about some conversations that happened since that last plea
19 conference. Specifically on that day, there were conversations
20 in this courthouse, and then by telephone, between myself and
21 the prosecutors in which it was told to me that there was an
22 option for my client to plead to the (b)(1)(C). This past
23 Thursday, my client sought to avail himself of that offer, and
24 I was told that that offer had evaporated without it being told
25 to me that that offer would be going away. So we will be going

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1 forward with trial.

2 THE COURT: All right. Look, the reason I'm
3 inquiring, of course, is to make sure that the defendant, if
4 there was a plea offer on the table, was notified of it and
5 made the decision, as opposed to counsel making the decision
6 for the defendant. What you're telling me, essentially, is the
7 opposite, which is that late in the day at some point last week
8 your client expressed an interest in pleading guilty to a
9 (b)(1)(C), but that no such offer, you were informed, was on
10 the table.

11 Do I have that right?

12 MR. MCGUINNESS: That is correct.

13 THE COURT: Government, anything to say in response?

14 MR. BHATIA: That conversation did happen on Thursday
15 where defense counsel indicated an interest in a (b)(1)(C) plea
16 offer that we had previously extended in August. We extended
17 that offer in writing on August 24; it expired on August 29.

18 THE COURT: I'm not getting in the middle of plea
19 negotiation, but I take it, by some written term, the deadline
20 for its expiration was set out for the defense?

21 MR. BHATIA: That's right. There was a deadline that
22 was in late August. To the extent we had conversations about
23 perhaps having more conversations about a plea, we never, ever
24 would leave open an offer like that indefinitely until the
25 Thursday before trial to be accepted whenever the defendant

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1 wants. So, I don't accept the characterization from defense
2 counsel, just so there's a perfectly clear record.

3 THE COURT: I don't think defense counsel is
4 representing that the government had left open the offer after
5 the expiration date that you had given. I think defense
6 counsel is disappointed that the offer wasn't reopened.

7 Let me finish with Mr. Bhatia. But go ahead,
8 Mr. Bhatia. I cut you off.

9 MR. BHATIA: I don't have anything more to add, your
10 Honor.

11 THE COURT: All right. Mr. McGuinness, you're rising.
12 Was there a deadline set for the expiration of the
13 plea offer in writing?

14 MR. MCGUINNESS: There was, your Honor. And it was to
15 my surprise both that on the date of the final pretrial
16 conference and subsequent to that, the government indicated to
17 me that he could still take the (b)(1)(C), that would be
18 available to him.

19 THE COURT: Mr. Bhatia, again, I need to make a record
20 here. Following the expiration of the written plea offer on
21 the date indicated, Mr. McGuinness indicates there were oral
22 conversations that suggested to him that a (b)(1)(C) might
23 still be attainable.

24 MR. BHATIA: Your Honor, I do recall speaking with
25 defense. There might have been discussions orally around the

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1 time of that initial August 24 plea offer and when it elapsed
2 on August 29 to give some modest extension until, perhaps, the
3 final pretrial conference in that case. I don't remember if we
4 had -- it would have been an extension of a few days, not an
5 extension until August. And then at the final pretrial
6 conference, it was conclusive on the record, rejected, we're
7 going to trial.

8 THE COURT: Let me put it this way. Since the final
9 pretrial conference—because we had closure at that point—have
10 there been discussions in which the government indicated to
11 defense counsel that the (b)(1)(C) offer might in effect be
12 reopened?

13 MR. BHATIA: No. And there were no discussions about
14 what the terms of a new offer might be on a new date. Those
15 terms might change very much. A plea offer extended on
16 August 24 might not be the same one that we could enter into in
17 good faith on the Thursday before trial.

18 THE COURT: I take it, in part, because as the
19 government's trial preparation goes on and the investigation
20 continues, the known facts or the reasonably establishable
21 facts may change.

22 MR. BHATIA: Precisely.

23 So to the extent we -- by the time of the final
24 pretrial conference, there were no other negotiations
25 afterwards.

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1 THE COURT: For the record, the final pretrial
2 conference was two weeks ago today, October 3.

3 MR. BHATIA: That's right.

4 THE COURT: So in the last two weeks there's not been,
5 even orally, a reopening of an earlier plea offer or a
6 communication, even orally, of a new one?

7 MR. BHATIA: One moment, your Honor.

8 (Counsel conferred)

9 MR. BHATIA: Your Honor, I don't have the dates of our
10 oral conversations. There were conversations about the terms
11 of a separate type of plea. And I don't recall if those were
12 before the final pretrial conference or after the final
13 pretrial conference, but it was a plea that would not be to one
14 (b)(1)(C) to resolve the whole case. It was a different type
15 of plea offer --

16 THE COURT: Mr. McGuinness.

17 MR. BHATIA: One more moment, your Honor.

18 -- which we rejected. We said that plea offer we will
19 not entertain.

20 THE COURT: Okay.

21 MR. BHATIA: Or that plea offer we will not extend.
22 So in terms of a different plea, we said we would not extend.

23 THE COURT: In other words, there were some
24 discussions in this space, but the relevant issue is, did the
25 government since the final pretrial ever offer a concrete

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1 plea -- make a concrete plea offer to the defense?

2 MR. BHATIA: No.

3 THE COURT: Okay. Mr. McGuinness, understanding there
4 were discussions of some sort, is it correct that after the
5 final pretrial conference, the government never made a firm
6 offer as opposed to having discussions?

7 MR. BHATIA: Your Honor, I would say there's no
8 written offer; certainly, I would concede that. I would
9 definitely characterize the discussions we had quite
10 differently. And what your Honor suggested and what AUSA
11 Bhatia has suggested is, firstly, consistent with everything
12 I've seen in the cases in my many years. In the many years
13 I've been doing this, what they do in cases is there's an
14 expiration date. And after that date, the plea offers get
15 worse, not better. It is not consistent, however, what
16 happened here. After the final pretrial conference, it was
17 indicated to me that he had a (b)(1)(C) option on the table.
18 And there was a discussion about --

19 THE COURT: Were the terms of that (b)(1)(C)
20 option—for example, the guideline calculation—communicated to
21 you at that time?

22 MR. BHATIA: We had a lengthy conversation in which I
23 attempted to move the government to a lower guidelines
24 calculation. They indicated to me numerous times that they
25 were open to hearing arguments for a lower guidelines

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1 calculation. They were flexible on that. Ultimately, I didn't
2 prevail. At the end of the conversation and throughout, they
3 stuck with the initial guidelines calculation that they've been
4 at the entire time. It certainly didn't go higher. Of course,
5 the point for a timely acceptance of responsibility would not
6 be given to Mr. Mial.

7 THE COURT: I mean, it sounds to me as if you're
8 saying the government orally indicated that there were terms
9 under which a (b)(1)(C) might be attainable, but you weren't
10 able to reach a meeting of the minds on those terms.

11 MR. MCGUINNESS: That's correct, your Honor.

12 THE COURT: Look, the relevant issue, as you know, for
13 me is at this point to make sure that any plea offer was
14 conveyed to the defendant. It does not appear as if any --
15 insofar as the one offer that was made in writing had expired,
16 it does not appear to me as if a firm alternative offer was
17 made. Rather, it sounds to me as if—consistent with practice
18 in many cases—discussions remained open, but they never got
19 the "yes." You tell me. Otherwise, we have a little bit of an
20 issue here. I want to get it resolved now so we don't have a
21 needless 2255 at some future point.

22 MR. MCGUINNESS: No. I believe as you just said it,
23 your Honor, that's correct.

24 THE COURT: Okay. In other words, to be very direct,
25 there was no firm, binding, all terms set out, specific plea

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1 offer made to you, but there were discussions in that space,
2 but they never got to that point?

3 MR. MCGUINNESS: Your Honor, if there was an offer on
4 the table -- I'm sorry, your Honor. I don't mean to quibble.
5 But the "firm, binding" part of it, orally, I don't want to say
6 the wrong thing.

7 My understanding and my impression from the
8 conversations was that my client, had he said yes, would be
9 given that offer. I conveyed that to my client. My client, on
10 Thursday, indicated he would like to take that offer, and then
11 I was told it was too late.

12 THE COURT: Well, the bottom line is your client, from
13 the defense perspective, was the decision-maker here, correct?

14 MR. MCGUINNESS: Yes, your Honor.

15 THE COURT: In other words, there may or may not be a
16 dispute between the two of you as to whether some new offer was
17 made, but even if it was—taking your view of things—your
18 client—as opposed to you—decided how to proceed, and then the
19 government clarified that, from its perspective, there was no
20 such offer on the table.

21 Is that right?

22 MR. MCGUINNESS: Yes.

23 THE COURT: Okay. Look, we have here a difference of
24 view as to whether the government conveyed an offer to the
25 defense. At the end of the day, from experience, these are

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1 usually put in writing, as the original offer was. It's not
2 common, in my experience, that the government characterizes
3 something verbal as ultimately a firm plea offer. Often, those
4 written offers are preceded by verbal discussions. But the
5 relevant issue, from my perspective, is who the decider was at
6 the defense table.

7 Mr. McGuinness, did you faithfully convey your
8 understanding of the government's position, whether it was
9 right or wrong, at all times to your client?

10 MR. MCGUINNESS: Yes, I did.

11 THE COURT: And did you, each time, convey to the
12 government client's position?

13 MR. MCGUINNESS: I did.

14 THE COURT: And when was it that you say your client
15 indicated that he was interested in accepting terms of a plea
16 offer that you believed was on the table?

17 MR. MCGUINNESS: It was this past Thursday, your
18 Honor.

19 THE COURT: Okay. And what were the terms that you
20 told your client you believed an offer consisted of?

21 MR. MCGUINNESS: It would be the same as the written
22 plea offer but he would not get credit for the timely
23 acceptance, that one guidelines point.

24 THE COURT: And who was it from the government that
25 told you orally, in your view, that told you that an offer

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1 consistent with the earlier offer, with only a change of one
2 point in the offense level due to the elimination of the third
3 acceptance point, who was it that told you there was a firm
4 offer available on those terms?

5 MR. MCGUINNESS: Well, your Honor, the conversation
6 was with AUSA Bhatia.

7 THE COURT: Where were you when you had that
8 conversation?

9 MR. MCGUINNESS: I was in my office on the telephone.

10 THE COURT: And then you spoke to your client?

11 MR. MCGUINNESS: Yes.

12 THE COURT: And your client said, On second thought,
13 I'll take that offer?

14 MR. MCGUINNESS: It was days later, but yes.

15 THE COURT: So Thursday was the 13th?

16 MR. MCGUINNESS: I'm sorry, your Honor. I think I was
17 a bit confused. But the conversation I had with AUSA Bhatia
18 was on the date of the final pretrial conference.

19 THE COURT: I'm sorry. So that was on the 3rd?

20 MR. MCGUINNESS: Yes.

21 THE COURT: So you're saying you had a phone
22 conversation with AUSA Bhatia after the final pretrial
23 conference, after I allocuted you and your client about plea
24 offers?

25 MR. MCGUINNESS: Yes.

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1 THE COURT: At that time, AUSA Bhatia, you say said to
2 you, The old offer stands, save the reduction of the acceptance
3 credit to two points, rather than three; correct?

4 MR. MCGUINNESS: Yes. In substance, yes, so my client
5 could resolve the case with the (b)(1)(C) offer.

6 THE COURT: And you understood that to be a final,
7 firm offer?

8 MR. MCGUINNESS: I did.

9 THE COURT: And you conveyed that to your client?

10 MR. MCGUINNESS: Yes.

11 THE COURT: Who said to you, at this point, "Yes"?

12 MR. MCGUINNESS: At that point, it was a no.

13 THE COURT: It was a no?

14 MR. MCGUINNESS: And then days later, this past
15 Thursday, it was a yes.

16 THE COURT: I see. And when your client said no, did
17 you convey that to AUSA Bhatia?

18 MR. MCGUINNESS: I did not, no. I continued to have
19 conversations with my client.

20 THE COURT: Whatever your understanding was on the day
21 of October 3 when you say AUSA Bhatia reprised the old plea
22 offer with a one-point difference in the offense level, was
23 there a discussion on that day how long that oral offer would
24 remain open?

25 MR. MCGUINNESS: No, your Honor.

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1 And I will say I did register surprise that this was
2 odd that this offer would be open so late. This is not the
3 practice of the office for them to extend a (b)(1)(C) offer so
4 close to trial, certainly after I received the 3500 material.
5 But I said there must be some factor that is at play here, and
6 I continued to speak with my client.

7 THE COURT: The obvious possibility here being that
8 there was some miscommunication between you, and you perceived
9 the offer to be firm and to be perpetual, and AUSA Bhatia did
10 not perceive it that way at all? I mean, that seems to be the
11 generously put takeaway here.

12 MR. MCGUINNESS: I can't rule that out, certainly,
13 your Honor. But I will say it was a fairly substantive
14 conversation about guidelines and around taking that offer.

15 THE COURT: All right. I'm just going to inquire of
16 your client whether the series of events you recounted is
17 consistent with what you told him.

18 MR. MCGUINNESS: Yes, your Honor.

19 THE COURT: All right. Good morning, Mr. Mial.

20 THE DEFENDANT: Good morning.

21 THE COURT: You recall that at the final pretrial
22 conference, I asked you a few questions about a plea offer that
23 had been put to you. And at that time, you told me that it had
24 been communicated to you and you had turned it down. There's
25 now been some discussion about conversations that occurred

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1 since the final pretrial conference. I just have a few
2 questions to put to you.

3 Have you been following the conversation I've been
4 having with the lawyers?

5 THE DEFENDANT: Yes.

6 THE COURT: And you understand that the government
7 denies that it made a firm oral offer to your counsel after the
8 final pretrial conference, but your counsel believes that it
9 did. In any event, did your counsel communicate to you that he
10 understood that there was a plea offer available to you at some
11 point soon after the October 3 final pretrial conference?

12 THE DEFENDANT: Yes.

13 THE COURT: And your counsel says at first you said no
14 to him, correct?

15 THE DEFENDANT: Yes.

16 THE COURT: You need to speak louder. I'm sorry.

17 THE DEFENDANT: Yes.

18 THE COURT: Okay. Your counsel says that at some
19 point later on he spoke to you and you, in effect, changed your
20 mind and decided that you would like to take that offer; is
21 that correct?

22 THE DEFENDANT: Yes, I changed my mind.

23 THE COURT: Mr. McGuinness, when did that occur, in
24 your view?

25 MR. MCGUINNESS: It was this past Thursday, your

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1 Honor.

2 THE COURT: Okay. At that point, Mr. McGuinness, you
3 said you contacted the government to say, in your belief, that
4 this oral offer is still open and you would like to take it?

5 MR. MCGUINNESS: Yes, your Honor.

6 And for the record, it was the 13th, this past
7 Thursday.

8 THE COURT: Okay. Mr. Mial, is it correct then that
9 on the 13th you had indicated to your lawyer that you would
10 like to take that offer, assuming it was still open?

11 THE DEFENDANT: Yes.

12 THE COURT: Okay. At all points, you were the
13 decision-maker, as opposed to Mr. McGuinness, as to what the
14 defense's position would be on a plea offer?

15 THE DEFENDANT: I was a decision-maker.

16 THE COURT: Okay. Mr. McGuinness, is there anything
17 further I should allocute your client to about this?

18 MR. MCGUINNESS: No, your Honor.

19 THE COURT: Mr. Bhatia, is there anything further?

20 I appreciate there that there's a difference in
21 opinion between counsel as to the communications, but at the
22 end of the day the relevant inquiry is, you know, there needs
23 to be a meeting of the minds. There needs to be a signed plea
24 agreement. There isn't one. There's no claim here that there
25 was some improper reliance in any way or anything like that.

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1 Sometimes there's a miscommunication. I'm generously assuming
2 that's all that happened here.

3 Is there anything further I need to do by way of
4 allocution of the defendant?

5 MR. BHATIA: No, your Honor.

6 THE COURT: Anything further you want to say on this
7 point?

8 MR. BHATIA: Your Honor, I think what you've allocuted
9 the defendant on is adequate.

10 THE COURT: Okay. Look, I will just state for the
11 record, it's not my business who takes what plea offers, and I
12 don't get in the middle of those. But I will just note, as a
13 frequent observer of the plea process, that it would be highly
14 anomalous for a binding offer to be conveyed orally. And it
15 would be especially anomalous with a written offer that had
16 previously been conveyed that carried a written expiration
17 date.

18 So while I do not in any way, shape, or form challenge
19 the sincerity by which Mr. McGuinness claims to have believed
20 that he was receiving a binding plea offer, Mr. McGuinness's
21 perception of surprise that such a thing would happen is shared
22 by the Court. It's very improbable that experienced
23 prosecutors would be conveying an oral offer like that after a
24 written one had expired. Much more typical is that the
25 conversations reopened. But unless and until there's something

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1 in writing, it's not understood to be a written plea offer.
2 I'm just describing that by way of experience. There's
3 nothing, in other words, here that indicates to me anything
4 like a sharp practice. It appears that counsel, in good faith,
5 had some miscommunication.

6 With that, turning to our next subject, status of
7 stipulations at the final pretrial conference.

8 Mr. Bhatia, there was some discussion about, in
9 particular, laboratory stipulations and the like. How did
10 things end up with that?

11 MR. BHATIA: We have agreed to four stipulations, your
12 Honor. The stipulations relate to certain of the laboratory
13 reports, Department of Motor Vehicle records, phone extraction
14 records, and phone carrier records, like toll records.

15 THE COURT: Okay. Is there an exhibit list that
16 counsel can hand up?

17 MR. BHATIA: Yes, your Honor.

18 THE COURT: I'm sorry. Mr. Smallman tells me my
19 chambers already has it. Thank you.

20 Given the stipulations, what is the government's
21 current estimate, realistically, of the trial length? It
22 sounds like you were able to reach the maximum amount of
23 stipulations you were hoping for.

24 MR. BHATIA: So, your Honor, we didn't come to an
25 agreement on the stipulations that I think would have cut the

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1 number of witnesses. So we are expecting to call 17 lab
2 witnesses, which I think your Honor called at the last
3 conference a conga line of witnesses. It's true, they are
4 coming on Wednesday. We have noticed 17 of those lab analysts
5 to come on Wednesday. So our expectation is still a lengthy
6 week-long trial.

7 THE COURT: Will those witnesses all be testifying
8 that the result tested was crack cocaine or cocaine based?

9 MR. BHATIA: Some of them will be testifying that some
10 of their labs were crack cocaine. Some of them tested as
11 cocaine because, at the time, the laboratory was only testing
12 those substances for cocaine.

13 THE COURT: So in other words, given that -- I was
14 prepared to tell the jury that the trial is expected to last
15 four to five days but, in any event, it's expected to be done
16 this week. That remains accurate?

17 MR. BHATIA: That's right.

18 THE COURT: Very good.

19 Mr. McGuinness, any reason to depart from that
20 estimate?

21 MR. MCGUINNESS: No, your Honor.

22 THE COURT: Okay. Next subject involves the proposed
23 jury charge.

24 Mr. McGuinness, I've received one from the government;
25 I've not received one from the defense. There may be good

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1 reason for that. These are very familiar charges and nobody
2 has identified, as of yet, any unusual feature of the case.
3 None the less, I note that I haven't received one. Should I be
4 expecting one?

5 MR. MCGUINNESS: No, your Honor. Your Honor has
6 correctly identified why I haven't submitted one. Pursuant to
7 your Honor's individual practice rules, I didn't submit
8 commonly used instructions because I assumed the Court would
9 use --

10 THE COURT: Very good. There it is.

11 Next issue involves the undercover. Is there any
12 chance that that person will testify today, particularly given
13 that jury selection is unlikely to start until about 10:30?

14 MR. BHATIA: Yes, I would pin it as likely.

15 THE COURT: What number witness is the undercover?

16 MR. BHATIA: The third witness.

17 THE COURT: Okay.

18 MR. BHATIA: The first two are relatively short, your
19 Honor.

20 THE COURT: All right. Off the record.

21 (Discussion off the record)

22 THE COURT: Back on the record.

23 All right. The next issue I have involves the
24 government's letter of yesterday afternoon, docketed at Docket
25 236. Specifically, the government identifies their information

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1 with respect to certain law enforcement witnesses as to whom
2 either disciplinary complaints or civil lawsuits have been
3 brought. The government moves to preclude examination of the
4 witnesses on those topics.

5 Mr. Bhatia, let me just get a sense of the time
6 sensitivity of all this. Are your first two witnesses
7 implicated by this motion?

8 MR. BHATIA: Yes, your Honor. So, Officer 1, Officer
9 2, we expect to be our first two witnesses. And then the NYPD
10 undercover officer could be the third witness.

11 THE COURT: Is the NYPD undercover one of the -- that
12 person is implicated as well?

13 MR. BHATIA: Implicated in one lawsuit.

14 THE COURT: Right. Okay. So we do need to resolve
15 this promptly.

16 Mr. McGuinness, is there a controversy here?

17 MR. MCGUINNESS: Your Honor, if I could just say as an
18 initial matter, I don't understand why we're doing numbers
19 instead of names. This is all information that's not private.

20 THE COURT: We're doing it because, if I'm excluding
21 the evidence, there's no need to needlessly tar the name of
22 somebody. That doesn't promote the search for truth or the
23 resolution of it for me to be referring to the person as
24 Mr. Jones, or whatever his or her name would be, when we can do
25 it that way.

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1 MR. MCGUINNESS: I'm sorry. I just don't have the
2 translations to the numbers committed to my memory, so I'll do
3 my best.

4 THE COURT: Are you telling me you don't know who
5 officer 1, officer 2 and officer 3 are? You clearly know who
6 the undercover is.

7 MR. MCGUINNESS: I know who the undercover is. The
8 government indicated the undercover might be called today. Is
9 the undercover going to be the first witness?

10 THE COURT: The government has indicated that the
11 undercover is its third witness.

12 So the sequence here of the issues we need to resolve
13 in terms of the government's motion is officer 1 first, officer
14 2, and then the undercover.

15 I think the undercover will be on the stand,
16 Mr. Bhatia, for quite some time.

17 MR. BHATIA: That's right.

18 THE COURT: So what's urgent today is resolving
19 officer 1, officer 2, and the undercover. If the defense wants
20 to let the issue marinate as to later witnesses, we can take
21 care of that first thing tomorrow.

22 MR. BHATIA: That would be fine.

23 THE COURT: All right. So, Mr. McGuinness, let's just
24 focus on those three people.

25 Are you objecting to what the government seeks here?

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1 MR. MCGUINNESS: Well, your Honor, I don't have an
2 objection, I'll say at the outset, to the lawsuits being
3 precluded. I didn't intend on asking about civil lawsuits.

4 THE COURT: Okay. So the government's motion to
5 preclude any questioning or other evidence with respect to
6 civil lawsuits is granted as unopposed, correct?

7 MR. MCGUINNESS: Yes, your Honor.

8 THE COURT: Okay. So now turning to internal
9 discipline, I guess is the best way to put the other category,
10 or allegations explored internally, let's focus on officer 1,
11 just to break this down. That's set out on page 2 into 3 on
12 Docket 936.

13 What's your view?

14 MR. MCGUINNESS: So, yes, your Honor, I do believe
15 that this is relevant and goes to truthfulness. I mean, it
16 seems like he was disciplined because his version of events is
17 that he wasn't instructed properly to testify, but that may
18 require -- I think it does require additional questioning to
19 see if that is the truth, that he was just told to testify
20 wrong or he falsified some testimony.

21 THE COURT: Was there any finding that he falsified
22 anything?

23 MR. MCGUINNESS: Your Honor, if I can, while I don't
24 see a finding that he falsified something, he received a
25 command discipline for this.

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1 THE COURT: Right. Sorry.

2 The issue is not whether it is a misstep, but whether
3 it's proper impeachment. And in that respect, it becomes
4 important whether or not there's a falsity or dishonesty as
5 opposed to some other form of misconduct. I mean, there's lots
6 of things that an officer can do wrong that are not proper
7 forms of impeachment. I'm trying to understand. As to officer
8 1, the allegations were dismissed in administrative
9 proceedings, but he received a command discipline. And the
10 specifications appear to be that, while on duty, he damaged
11 some property and failed to safeguard property.

12 Is there any way in which that's proper impeachment
13 material?

14 I mean, I'm focusing on the 2020. I realize there's a
15 2015 episode. So I guess we have to break those down. So
16 let's focus on the 2015 episode where the specification was
17 dismissed that he failed to prepare an appearance at the
18 Traffic Violations Bureau. He was given a command discipline.

19 Let me ask the government, what does a command
20 discipline in this circumstance mean? The allegations were
21 dismissed. What was he disciplined for in 2015? It's a little
22 unclear.

23 MR. BHATIA: Yes, your Honor.

24 So there are proceedings that can take place at the
25 administrative level in the NYPD; it's sometimes called a

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1 specification or a charge. And then an officer has the right
2 to contest that. There can be a short trial. They can be
3 found guilty or not guilty.

4 In this case, the specification was that he failed to
5 prepare for these court proceedings for which the witness would
6 say, I was mistakenly summoned to go present, and I said I
7 didn't know anything, when he called -- he was called to
8 testify about incidents in which he didn't participate. So he
9 said, I don't know anything about these incidents. There was a
10 specification within the NYPD to say that he simply failed to
11 prepare. Ultimately, that was dismissed because, of course, he
12 did not fail to prepare, he didn't know anything.

13 THE COURT: So he was as prepared as he could be for
14 something he didn't know anything about?

15 MR. BHATIA: Precisely.

16 My understanding is, at the precinct level, you can
17 still receive disciplinary -- command disciplines, which are
18 like -- it's instructions. It's like an official disciplinary
19 action, but it's an instruction at the precinct level.

20 One moment, your Honor.

21 (Counsel confer)

22 MR. BHATIA: It's an instruction to remedy a failure
23 to conduct police procedure, or policy I should say.

24 THE COURT: Was there a fact-finding at the precinct
25 level? Doesn't sound like how precincts work, but what was the

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1 factual basis, if you will, for such discipline as was imposed
2 in 2015?

3 MR. BHATIA: Your Honor, I don't think there's
4 typically a fact-finding procedure.

5 THE COURT: All right. In 2020, I think you set out
6 the facts.

7 Look, Mr. McGuinness, as to 2015, put this in to rules
8 of evidence terms, how is that possibly proper impeachment?

9 MR. MCGUINNESS: Your Honor, it's still a little
10 unclear to me whether the officer is saying, I didn't prepare
11 because I didn't know anything, if that's actually what
12 happened. And then he's disciplined for that. It seems like
13 he's being found -- I guess I'm still unclear what the
14 discipline was for. For failing to prepare for a hearing and
15 then he claims that he did prepare because he didn't know
16 anything -- I'm a little unclear. I'm sorry, your Honor.

17 THE COURT: Look, I'm going to preclude this. This is
18 clearly not proper cross-examination to begin with. There's no
19 coherently articulated version of events in which there is some
20 falsity or dishonesty by the officer. At most, the allegation
21 appears to be here that he failed to prepare for something.
22 While one would always want everybody to prepare well, the
23 failure to do so is not something that tends to impeach. On
24 the other hand, the fact that the officer received any form of
25 criticism or internal discipline would naturally have a

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1 potentially unfairly prejudicial quality by leading the jury to
2 conclude that an officer who had one prior uncharged bad act
3 was therefore incapable of being honest. That's not the way
4 Rule 403 works. Essentially, this is bad character evidence,
5 albeit at a very low level.

6 Beyond that, I would note that the opaque quality of
7 what happened here would mean that if we were to explore this,
8 it would wind up in precisely what Rule 403 counsels against,
9 which is a trial within a trial. We would be spending time
10 unpacking what exactly happened in 2015 at the precinct level.
11 That's not what this trial is about.

12 So both because this is not proper impeachment
13 evidence and under Rule 403, where I find the capacity to
14 confuse, delay, and unfairly prejudice the government to
15 outweigh the nonexistent probative value of bringing to the
16 fore this evidence, I'll exclude that.

17 Now as to 2020, is there something you'd like to say
18 about that one as to officer 1?

19 MR. MCGUINNESS: No, not on this incident.

20 THE COURT: I mean, are you seeking to offer that
21 evidence I guess is the question?

22 MR. MCGUINNESS: No, I'm not.

23 THE COURT: Then, look, I will grant the government's
24 motion as to the 2020 episode as to Officer 1 as unopposed.
25 It's also, as set out by the government, persuasive, that is to

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1 say the argument to preclude such lines of examination.

2 All right. As to Officer 2, there does not appear to
3 be any disciplinary incident. As to Officer 2, the only issues
4 in play are the civil lawsuits that defense counsel has taken
5 off the table.

6 Mr. Bhatia, am I reading that right?

7 MR. BHATIA: That's correct, your Honor.

8 I'll also note for the Court the footnote on page 4.

9 THE COURT: Right.

10 MR. BHATIA: We put that in a footnote. It's not part
11 of our motion to preclude, so I don't think there's anything
12 else for us to address. I just don't want your Honor to be
13 surprised.

14 THE COURT: Sorry. Just explain to me more concretely
15 about what you're saying about footnote 3 on page 4.

16 Footnote 3 reflects there was a civil lawsuit in a
17 case called *Fuentes*, which the government is not able to obtain
18 records about it. Separately, though, there are disciplinary
19 actions against officer 2 involving a lab invoice discrepancy,
20 allegations of an unlawful stop and frisk, failure to prepare a
21 stop-and-frisk report; those three things.

22 What is the government's position as to that? As to
23 the disciplinary parts referred to in footnote 3, are you
24 seeking to preclude any of that?

25 MR. BHATIA: We're not right now. I think we'll have

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1 to see how the questioning goes, but we're not seeking to
2 preclude it right now. It's a little bit of an oddity where
3 there are allegations, which we of course disclosed to the
4 defense. The witness doesn't have any recollection, really,
5 about two of them entirely, and about one of them, forgetting
6 any disciplinary sanctions for it. So we'll have to see what
7 defense counsel wants to do with that. But we're just noting
8 for the Court that if something comes up during cross --

9 THE COURT: Well, it sounds to me that you're not
10 moving to preclude the defense from examining on any of those
11 three disciplinary actions, the first and third of which
12 involve substantiated allegations, and the middle of which --
13 the second one, the officer is found not guilty in an
14 administrative proceeding but received some form of
15 instructions or training.

16 The government's position is that, as to all three of
17 those, you're not seeking to preclude examination, but
18 depending on how the examination goes, you may seek at some
19 point to move to cut it off.

20 Am I understanding you right?

21 MR. BHATIA: That's right, your Honor.

22 THE COURT: Mr. McGuinness, any views on all of that?

23 MR. MCGUINNESS: No, your Honor.

24 THE COURT: All right. Look, there's nothing, then,
25 for me to rule on as to that. So as to Officer 2, the items

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1 within footnote 3 are, at this stage, fair game for examination
2 at trial. It's defense's view/position whether or not to --
3 whether it's worth it.

4 So then as to the undercover --

5 MR. BHATIA: There's just a lawsuit for the
6 undercover.

7 THE COURT: There's only a lawsuit for the undercover.
8 So there's no motion there?

9 MR. BHATIA: No, your Honor.

10 MR. MCGUINNESS: No issue, your Honor.

11 THE COURT: All right. And then I guess there are
12 several more officers, Officer 3, Officer 4, Officer 5, and the
13 NYPD's criminalist.

14 Mr. McGuinness, I won't put you to it now. I realize
15 the letter came in yesterday late afternoon. Would you prefer
16 to resolve that tomorrow morning or do you want to take it up
17 now?

18 MR. MCGUINNESS: Yes, if I could resolve it tomorrow.

19 THE COURT: That's fine. I'll ask you, then, first
20 thing tomorrow morning what your views are. And I'll ask you,
21 Mr. McGuinness, to set out right at the get-go what, if
22 anything, within the scope of each of those witnesses' reported
23 disciplinary history you are seeking the right to pursue. That
24 will narrow the scope of discussion.

25 MR. MCGUINNESS: Thank you.

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1 THE COURT: One moment.

2 (Pause)

3 THE COURT: All right. With that, I think that
4 exhausted the topics that I came here to raise. Let me go
5 around the horn to see if there are other issues that counsel
6 have.

7 Mr. Bhatia?

8 MR. BHATIA: No, your Honor, nothing else.

9 THE COURT: Defense?

10 MR. MCGUINNESS: Your Honor, just one minor things to
11 bring the Court's awareness to. My paralegal, Mr. Kim, has a
12 medical issue that may require him to leave during the
13 proceedings. He may have to leave early some days and not
14 return. He will, of course, come and go as unobtrusively as
15 possible. I just wanted to let the Court know.

16 THE COURT: Thank you for the heads up. And I wish
17 you well, Mr. Kim.

18 MR. KIM: Thank you.

19 THE COURT: Look, I'm going to take a recess now, but
20 counsel needs to stay close so that as soon as we hear that the
21 jury is coming, everyone is in there seats.

22 I will ask the government to please move those things,
23 which appear to be government exhibits, and to move the cart.
24 If you wish to move the cart into the witness room, that's
25 probably the smartest place for it to be, because it's getting

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1 kind of crowded here.

2 Okay. Very good. I'll see you as soon as
3 Mr. Smallman notifies me. Off the record.

4 (Discussion off the record)

5 THE DEPUTY CLERK: All rise.

6 (Recess)

7 (Continued on next page)

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1 (In open court)

2 THE COURT: Counsel, the jury is almost here.

3 Mr. Smallman informs me though that counsel may have an
4 application.

5 MR. McGUINNESS: Yes, your Honor.

6 THE COURT: Mr. McGuinness.

7 MR. McGUINNESS: I've taken the Court's word to heart
8 and tried to move this matter towards a resolution. I believe
9 we've made some progress potentially, but have an odd or
10 unusual application for the Court to inquire or direct the
11 questions of the safety valve.

12 THE COURT: Have the parties reached a plea agreement?

13 MR. McGUINNESS: No, your Honor. It would be an open
14 plea, but prior to doing that, we would want to secure the
15 safety valve.

16 THE COURT: I'll hear from the government in a moment,
17 but this is happening at breakneck speed. If you would be
18 asking me to engage in questioning or make some evaluation of
19 the answers without having any appreciation of the context or
20 the tools on which their veracity would be examined, I don't
21 see how I could do that. I don't understand what you're
22 asking.

23 MR. McGUINNESS: I guess it would be more to monitor
24 the scope of the questioning, your Honor. I believe the Court
25 would be in a good position to do that without a full grasp of

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1 the facts. I understand --

2 THE COURT: In other words, what you're proposing is
3 that -- I take it, the application here is to defer the
4 beginning of jury selection, that's ultimately what you're
5 asking, in the hope that some agreement can be worked out. The
6 jury is going to be here momentarily.

7 MR. MCGUINNESS: Yes, Judge, it would be a short
8 adjournment to see if we can work out a safety valve. In the
9 event that the safety valve went through successfully, we could
10 avoid the entire trial.

11 THE COURT: Mr. Bhatia, what's the government's view
12 about this?

13 MR. BHATIA: Your Honor, defense counsel sort of
14 brought this up to us in the last few minutes before your Honor
15 came out. I think we'd like to have the benefit of conferring
16 about it a little more, not a long time, but if we could have
17 five or ten minutes to think about it, that would be helpful
18 and I think helpful to the Court.

19 THE COURT: Let me see if I understand even what the
20 process is that's being discussed here. Nobody is representing
21 to me that the parties are anywhere close to a plea agreement.
22 There's no suggestion that the government is relenting on its
23 insistence on a plea to the (b)(1)(A) or whether to a (b)(1)(B)
24 or (b)(1)(C), there is no suggestion of that.

25 The suggestion is that the defendant would be making

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1 an open plea to the entire indictment, or at least Count One,
2 whatever the case may be, presumably the entire indictment, but
3 the defendant's willingness to do that is conditioned on
4 whether the Court in hearing the safety valve proffer would
5 agree that the prerequisites of it are met.

6 Mr. McGuinness, am I basically hearing it right?

7 MR. MCGUINNESS: Yes, your Honor. I'm afraid to say
8 there is one other complication.

9 THE COURT: Let's start with the first complication.

10 MR. MCGUINNESS: Yes, Judge.

11 THE COURT: The government has not had the opportunity
12 to prepare for this. Suppose there is something that your
13 client says that is, on reflection, inaccurate or untruthful or
14 disqualifying. Where are we then?

15 It would be one thing to say we'd like an adjournment
16 until tomorrow morning so that the defendant can do a safety
17 valve proffer through the government. If the government is in
18 a position to represent with its superior information that
19 based on the information presently known, the safety valve is
20 qualified for, that would be another story.

21 But the government is in a much better position than
22 the Court is, and I would be very uncomfortable in the crucible
23 to make some finding that may well be overtaken by later
24 considered information.

25 MR. MCGUINNESS: Yes, your Honor. I mostly am

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1 appealing to the Court's narrative scope of the questioning.
2 I'm concerned that there are differences in factual views
3 between my client and the government's case, and I think a
4 safety valve can be achieved without treading into those areas,
5 and I think the most effective way to do that would be with the
6 guidance of the Court.

7 THE COURT: So, in other words, you would not be
8 asking for the Court to make any assessment of credibility, but
9 rather to assess -- to set limits so that the government in
10 your view doesn't overstep as to areas of relevant question.

11 MR. McGUINNESS: That's correct, your Honor.

12 THE COURT: Mr. Bhatia.

13 MR. BHATIA: Your Honor, the scope is laid out in
14 Section 3553(f)(15).

15 THE COURT: All right. Which requires, among the
16 requirements for the safety valve, that: "Not later than the
17 time of the sentencing hearing, the defendant has truthfully
18 provided to the government all information and evidence the
19 defendant has concerning the offense or offenses that were part
20 of the same course of conduct or of a common scheme or plan."

21 That is the scope.

22 Mr. McGuinness, I'm loathe to get in the middle of
23 that. It would be one thing if you were in the middle of the
24 proffer, and there was something that was really out of bounds
25 that was being asked, but usually the safety valve is done by

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1 the executive branch with the defendant and not by the judicial
2 branch.

3 May I ask you, is there some area of questioning that
4 you believe would be out of bounds? Maybe there's no dispute
5 here. What are you worried about?

6 MR. McGUINNESS: Obviously, this is a conspiracy
7 involving many people, your Honor, and I am concerned
8 questioning about people that may or may not be relevant.

9 THE COURT: Are you concerned about questioning about
10 any of the people who are named in the indictment?

11 MR. McGUINNESS: Your Honor, I think potentially
12 questions that are outside of my client's involvement or
13 knowledge in the conspiracy, I'm concerned about going into
14 those areas.

15 THE COURT: Look, at the end of the day, your client's
16 obligation is to be truthful, but it's hard for me to see how
17 questioning within the scope of the charges as returned by the
18 grand jury would be out of bounds.

19 The government may or may not agree with or be
20 prepared to credit what your client is saying is truthful, and
21 that's a risk you run, but I don't see how -- if what you're
22 saying is you're going to raise questions about the government
23 asking about the conduct charged in the indictment by
24 co-conspirators, how do you have a leg to stand on given the
25 text of requirement 5?

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1 MR. McGUINNESS: Well, I wouldn't object to questions
2 that are about that, your Honor, about things that are within
3 my client's knowledge.

4 THE COURT: That doesn't -- that's no limitation
5 because there are presumably things within your client's
6 knowledge that are out of bounds.

7 The issue here is -- look, I mean, to the extent that
8 the notion is that on the fly we can delay the jury trial so
9 that you can come up with a somewhat unorthodox approach here,
10 I'm not in favor of it. If you feel that the -- if the parties
11 feel that a plea is in the offing, as long as a successful
12 safety valve proffer can be done today, I will consider putting
13 off the jury trial until tomorrow, but only if I'm getting both
14 parties telling me that that sounds like where we're at.

15 (Pause)

16 THE COURT: Mr. McGuinness, where are we?

17 MR. McGUINNESS: I think we should proceed with jury
18 selection.

19 THE COURT: All right. Government, any disagreement?

20 MR. BHATIA: No.

21 THE COURT: Look, I will simply say this: I cannot
22 get in the middle of your discussions. I would encourage you,
23 either at the lunch break, assuming one, or at the end of the
24 day, to take advantage of the more measured environment to see
25 if there's a place in which the case can resolve itself. But

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1 you should not be expecting me to get involved in that, and the
2 process of having me audit a safety valve proffer seems to me
3 irregular and unnecessary here.

4 Counsel have, no doubt, been party to many safety
5 valve proffers and probably have an intuitive understanding as
6 to the proper scope, but I'm not going to be supervising that.
7 I do encourage you to keep talking, but at this point with
8 nobody representing that a plea is imminent, we need to move on
9 with the jury trial.

10 Anything do before Mr. Smallman gets the venire?

11 MR. BHATIA: No, your Honor.

12 MR. McGUINNESS: No. Thank you.

13 THE COURT: Let's get the venire.

14 (Jury selection followed)
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